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No. 02 986

In The

# Supreme Court of the United States

Darrell D. Smith, Patrick M. Smith
John McBride, and John and Jane Doe,
PETITIONERS,

vs.

**STATE OF OREGON,**
RESPONDENT.

**On Petition For A Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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Petitioners Pro-Per

November 29, 2002

35 pp

## QUESTION PRESENTED

Whether the Ninth Circuit's decision to "Affirm" the lower courts decision, and denying plaintiff-appellants "Petition for rehearing en banc", so far deviated from the accepted and usual course of judicial proceedings as to deprive the petitioners of their Due Process and Equal Protection rights, and call for an exercise of this Court's supervisory powers.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners Darrell D. Smith, Patrick M. Smith and John McBride respectfully pray that a writ of certiorari issue to review the unpublished judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on June 13, 2002.

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## OPINIONS BELOW

The Memorandum of the United States Court of Appeals for the Ninth Circuit, erroneously entitled *DARRELL D. SMITH; et al., v. STATE OF OREGON,* is unpublished , and is included in the appendix attached hereto at page A-1. The June 13, 2002 Order of the Ninth Circuit, to deny petition for rehearing en banc, is included in the appendix attached hereto at page B-1. The Order and Judgment of the United States District Court for the District of Oregon in this case, Civil No. 00-1687-ST, was issued on April 4, 2001. For this Court's convenience, the district court's Order and Judgment is also included in the appendix at C-1.

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## JURISDICTIONAL STATEMENT

The date on which the United States Court of Appeals for the Ninth Circuit decided our case was June 13, 2002.

On the September 11, 2002, the petitioners filed a Petition for a Writ of Certiorari, which was not in proper form, and petitioners were granted sixty (60) from October 1, 2002, to perfect their petition and resubmit it to the Court.

This is petitioners perfected petition, and the jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The judicial Power of the United States set forth in Article III, Section 2, provides in pertinent part: "shall extend...to Controversies...between a State and Citizens of another State...and between a State, or the Citizen thereof, and foreign States, Citizens or Subjects."

The Due Process Clause of the Fifth Amendment provides in pertinent part: "No person shall be...deprived of life, liberty, or property, without due process of law."

Article IV, Section 4, provides "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion."

The relevant statutory provisions are found under the Declaratory Judgment Act , Title 28, U.S.C. Sec. 2201, under the heading **Creation of remedy**, which provides in relevant part..."any court of the United States, upon the filing an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought," and Sec. 2202 under the heading **Further relief**, which provides in relevant part..."further necessary or proper relief based on a declaratory judgment or decree may be granted...against any adverse party whose rights have been determined by such judgment."

And, the relevant statutory provision of the State of Oregon, in pursuant of the above stated statutory provisions, is found under Oregon Revised Statute 28.020, Oregon's declaratory judgment statute, which provides in relevant part: "any person whose rights, status, or other legal relations are affected may obtain a declaration by the court as to his or her rights under the law."

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## STATEMENT OF THE CASE

On April 4, 2001, United States District Judge Robert E. Jones adopted United State Magistrate Judge, Janice M. Stewart's "Finding and Recommendations" in its entirety, filed in regards to plaintiffs Civil Class Action for a Declaratory Judgment, and dismissed plaintiffs Civil Class Action with prejudice. Plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit. Said Court Affirmed the lower courts decision, and also denied plaintiffs petition for review.

### A. Original Civil Class Action and Proceedings

Do to the diversity of Citizenship of the named plaintiffs, of the John and Jane Does represented by said plaintiffs in the entitled case, and a conflict of interest between the plaintiffs and members of the judiciary of the United States District Court for the District of Oregon, the original Civil Class Action was filed in the United States District Court for the District of Columbia on June 8, 1999. The named defendant, State of Oregon, was served by mailing a certified true copy of the complaint to the Attorney General of the State of Oregon. On August 18, 1999, counsel for the defendant filed a Motion to Dismiss the Complaint for (1) insufficient service; (2) dismissing Compliant for improper venue, or in the alternative, transferring the action to the District of Oregon; (3) for lack of subject matter jurisdiction; and, (4) failure to state a claim. The plaintiffs, on September 2, 1999, filed a Motion for Leave to Amend and Perfect the Complaint. On December 14, 1999, the Court granted defendants

Motion in the alternative, and the action was transferred to the District of Oregon, and no other Motions or parts thereof were ruled on. Due to an oversight, the action wasn't transferred until December 2000.

**B. Amended Civil Class Action and Proceedings**

On December 12, 2000, the plaintiffs filed their Amended Civil Class Action in the United States District Court for the District of Oregon. On December 15, 2000, Janice M. Stewart, United States Magistrate Judge, who is an interested party, signed an Order granting plaintiffs Motion for Leave to Amend, and filed it with the Court Clerk on the same day at 3:41 PM. In this Order, said U.S. Magistrate Stewart states, "In this case, plaintiffs seek declaratory relief that Measure 362-363, approved by the voter of the State of Oregon on November 8, 1999, was not validly adopted and may not properly be made part of the Oregon Constitution." On that same date, said Magistrate signed her Finding and Recommendations, which she did not file with the Court Clerk until December 18, 2000, at 9:39 AM. In said Finding and Recommendations, U.S. Magistrate Stewart again states, "In this case, plaintiffs seek declaratory relief that Measure 362-363, approved by the voters of the State of Oregon on November 8, 1999, was not validly adopted and may not properly be made part of the Oregon Constitution." U.S. Magistrate Stewart also states erroneously, "Oregon has not consented to suit by explicitly waiving its Eleventh Amendment immunity. *See Rounds v.*

*OregonState Bd. Of Higher Ed,* 166 F3d 1032(9th Cir 1999); *Quillin v. Oregon,* 127 F3d 1136 (9th Cir 1979)." On December 18, 2000, shortly after 8:00 AM, counsel for the named defendant, **STATE OF OREGON**, was personally serve at 400 Justice Building, Salem, Oregon. On December 19, 2000, at 9:52 AM, plaintiffs returned the Summons and Return of Service for the Amended Civil Class Action to the United State District Court for the District of Oregon. The plaintiffs filed their Response in Support of Plaintiffs' Notice of Objection to Finding and Recommendations on January 8, 2001, wherein plaintiffs state that they have demonstrated that they meet the constitution minimum of standing elements thereby granting this Court subject matter jurisdiction. They also set out their conflict of interest between them and U.S. Magistrate Stewart; with said Magistrates substitution of proper plaintiffs with fictitious plaintiffs; that plaintiffs are not making any claims against any measures passed by the voters of the State of Oregon on November 8, 1999; and, that the Eleventh Amendment argument has no relevance in plaintiffs Civil Class Action.

**C. District Court Opinion**

The district court gave de novo review of Magistrates Judge Stewart's rulings and found no error, and accordingly adopted Magistrate Stewart's Finding and Recommendations dated December 15, 2000, in its entirety. The district court then Order and Adjudged this case dismissed with prejudice on April 4, 2001.

**D. Appellate Court Opinion**

Petitioners Darrell D. Smith, Patrick M. Smith and John McBride timely appealed the district court's ruling, arguing in their appellant's opening brief, *inter alia* that said plaintiffs never allege a claim under 42 7U.S.C. 1983; that the Eleventh Amendment is not an issue; and, that the "strawman", "fiction", (corporate) **STATE OF OREGON**, and not the State of Oregon of 1859, is the true and only defendant named in the complaint. In response to plaintiffs opening appellant's brief, the counsel for the named defendant, Timothy A. Sylwester, Assistant Attorney General for Oregon, erroneously pleaded *inter alia* that the plaintiffs civil class action is to be construed in light most favorable to them as an attempt to allege a claim under 42 U.S.C. Sec. 1983; argued that the Eleventh Amendment bars their [42 U.S.C. Sec. 1983] claims against the State of Oregon; and, that the district court correctly dismissed the complaint against the State on the ground that it is immune from suit in federal court under the Eleventh Amendment.

On March 21, 2002, the United States Court of Appeals for the Ninth Circuit, before Canby, Beezer and Paez, Circuit Judges, filed its MEMORANDUM *inter alia* that the district court properly dismissed this [42 U.S.C. 1983] action under the Eleventh Amendment, because the State of Oregon has not consented to suit, and AFFIRMED the lower courts decision. On June 13, 2002, the United States Court of Appeals for the Ninth Circuit denied plaintiffs petition for rehearing en banc.

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## REASONS FOR GRANTING THE WRIT

Fundamental fairness compels this Court to provide desperately needed guidance through the grant of a writ of certiorari here. By virtue of the Ninth Circuit's; erroneously construing this case to be a 42 U.S.C. 1983 action; the misapplication of *SEMINOLE TRIBE OF FLORIDA v. FLORIDA*, 517 U.S. 44 (1996) in support of their decision; and, effective refusal to follow the dictatee of the law in the State of Oregon with regards to mandated exemptions by law of said State to said States immunity under the Eleventh Amendment doctrine, is depriving the plaintiff's of their right to due process and equal protection under the law in the instant case.

The Ninth Circuit's false assumption that this is a 42 U.S.C. 1983 action, and their decision based on *SEMINOLE TRIBE OF FLORIDA v. FLORIDA, supra,* with regard to the Eleventh Amendment doctrine is contrary to the Court's holdings in *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943), and *Erie R. Co. v. Tompkins,* 304 U.S. 363 (1938), and State and Federal Statutes; the rights asserted by the plaintiffs; and, contrary to the most resent decision of the supplanted Supreme Court of the State of Oregon, and the supplanted Circuit Court of the State of Oregon for the County of Marion in regards to the issue presented in the instant case.

### I.

### THE NINTH CIRCUIT'S UNPUBLISHED ORDER IGNORES THAT COURT'S AUTHORITY, AND

**THIS COURT'S AUTHORITY UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION; THE LAW OF THE STATE OF OREGON; AND, THE HOLDINGS OF THE SUPLANTED SUPREME AND CIRCUIT COURT OF THE STATE OF OREGON, AND SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO DEPRIVE PETITIONERS OF THEIR RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW, AND AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER. THIS COURT MUST EXERSICE ITS SUPERVISORY POWER IN LIGHT OF THE NINTH CIRCUIT'S FAILURE TO ADHERE TO THE ORIGINAL PLEADING OF THE PLAINTIFFS; THE HOLDINGS OF THIS COURT AND OF THE SUPLANTED COURTS OF THE STATE OF OREGON; AND, THE DECTATES OF LAW OF THE STATE OF OREGON.**

Left unaltered, the Ninth Circuit's Order represents a serious erosion of both State and Federal constitutional protections accorded by this Court , and the original, as well as the supplanted, courts of the State of Oregon. Left unaltered, this Court will allow the Ninth Circuit to ignore and contravene the standards clearly enunciated and upheld by this Court, and by the supplanted courts of Oregon, made in pursuant thereto.

**A. Introduction**

Petitioners Smith, Smith and McBride state for the record, and to all parties of interested, that the petitioners herein never brought their civil class action under 42 U.S.C. 1983. Further, petitioners argued below that the STATE OF OREGON does not have immunity from suit in this instant case; the State has consented to suit; and, that the Federal Courts do have subject matter jurisdiction over petitioners civil class action suit.

**B. Under Clearfield Doctrine Governments Lose All Cloak Of Immunity**

With regard to the Eleventh Amendment immunity claimed by the counsel for the defendant, this Court has ruled that "governments are corporations." *Penhallow v. Doane*, 3 Dall 55; *Clearfield Trust Co. v. U.S.*, 318 US 363 (1943). This Court's decision in the Clearfield Trust Co. case established what is known as the Clearfield Doctrine that states, "Governments descend to the level of a mere private corporation and takes on the character of a mere private citizen [where private corporate commercial paper are concerned" . . . "For purposes of suit, such corporations and individuals are regarded as an entity entirely separate from government." *Bank of US v. Planters Bank*, 9 Wheaton (22 US) 904, 6 L. Ed. 24. Where the State of Oregon of 1859, and the strawman STATE OF OREGON, both operate as private corporations, and

deal only in private corporate commercial paper rather than substance, they lose all cloak of immunity.

**C. State Of Oregon Has Consented To Suit**

Whether the defendant has Eleventh Amendment immunity or not ceases to be an issue as the State of Oregon has consented to suit, and said consent is mandated by law. Petitioners want to give notice to this Court, and all interested parties hereto, that the following authorities supporting petitioners claim that the State of Oregon has consented to suit for declaratory judgment is only submitted and referred to for the truth and merits stated therein, and is not to be construed to defeat plaintiff's civil class action or this Petition for a Writ of Certiorari. The case in point here is *Audrey McCall,et al v. John Kitshaber, M.D.; Bill Bradbury; and the State of Oregon and its political subdivision*, Case No. 00C19871, and *League of Oregon Cities, et al v. State of Oregon, et al*, Case No. 00C20156. These two cases were consolidated, and in the Opinion of the CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION under PRELIMINARY MATTERS it is stated that, "This is a suit for a Declaratory Judgment seeking a declaration that initiative Measure 7, which appeared on the November 7, 2000 ballot, was not properly submitted to the voters and is invalid." Under PROCEDURAL ISSUES the court stated, "Defendants...argue that Plaintiffs lack the necessary legal standing to raise their claims, that these claims are non-justiciable, and that this court lacks jurisdiction to grant the requested

relief." To these claims of the defendants the court ruled, "ORS 28.020, Oregon's declaratory judgment statute, provides that any person "whose rights, status, or other legal relations are effected" may obtain a declaration by the court as to his or her rights under the law. Plaintiffs...have standing to bring a claim under the declaratory judgment statute." The court, in this same opinion, also made the following statement, "As this court has previously noted, under our Constitutional form of government it is the institutional responsibility of the Judicial Branch to referee disputes over the Constitutionality of both the statutes passed by the elected legislature and the initiative measures passed by the popular legislature, the voters. The doctrine of separation of powers is fundamental to our system, and in accordance with that doctrine, the duty, power and responsibility to interpret the Constitution, and to determine whether it has been complied with, rests with the Judiciary alone." *State v. Kuhnhausen*, 201 Or. 478, 517, 266 P2d 698, 272 P2d 225 (1954). See also Alexander Hamilton, The Federalist Papers no. 78 (1788) ("The interpretation of the laws is the proper and peculiar province of the courts.")

**D. Strict Provisions For Amending Oregon Constitution**

The interpretations of the courts of Oregon on the procedures for amending the Oregon Constitution through the initiative process are unanimous, as noted in *Boyd v. Olcott*, 102 Or 327, 359, 202 P 431 (1921) "The provisions of the Constitution for its own amendment

are mandatory and binding not only upon the legislative assembly, but also upon all the people as well; and, consequently, a failure to observe the mandates of the Constitution is fatal to the proposed amendment, even though the electors have with practical unanimity voted for it."
And, *Kadderly v. Portland*, 44 Or. 118, 135-36, 74 P 710 (1903), 75 P 222 (1994) "The provisions of the Constitution for its own amendment are mandatory, and must be strictly observed....The Constitution is the supreme law of the land, binding on all and can no more be disregarded in the manner of its own amendment than in any other respect."

Although petitioners are in complete agreement with the above stated interpretations, they argued below, with supporting documentation attached as exhibits, that a purported initiative measure, no. 362-363, on the ballot of the November 8, 1910 general election, and purported adopted by the voters, does not and can not fit within the frame work of the provisions of the Constitution for its own amendment that are mandatory, and must be strictly observed. Petitioners also established with supporting documentation that the original copy of the initiative in question is not on file with the Secretary of State, and that there is no copy of the State wide abstract of votes for the November 8, 1910 general election. Likewise, there is no abstract of votes on file in any of the counties of Oregon for the November 8, 1910 election. Without both, neither the initiative measure or its passage can be verified. The purported initiative supplanted the original Article VII, with its 21 sections, of the Oregon Constitution, that was ratified by Congress in 1859, with a new Article

VII, with 7 sections. Stated more specifically, the purported initiative supplanted the entire Judicial Branch of the State of Oregon. This included the Judicial Oath of Office. In the case of *STATE EX REL. SMITH v. TAZWELL*, 111p. (2D) 1021, (1941), the supreme Court of Oregon held "Before any judge of the circuit court can enter upon the duties of his office, he must, under section 21 of the original Article VII of the constitution, take and subscribe to the following oath and transmit the same to the secretary of state:

"I,_____, do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the state of Oregon; and that I will faithfully and impartially discharge the duties of a judge of the supreme and circuit courts of said state, according to the best of my ability, and that I will not accept any other office, except judicial offices, during the term for which I have been elected." This is still the holding to this day.

On October 10, 2001 Chief Justice Carson sent a memorandum to all elected and appointed judges in Oregon, informing them that the oaths provided to judges upon election was not the proper oath, and sent along two forms of oath, one for the elected judges and one for appointed judges. But these forms were the Article VII (amended), section 7 supplanted oath.

On November 12, 2002 on the editorial page of the Oregonian newspaper there is an article petitioners feel is worth quoting briefly, titled "Oregon cuts its courts"

"During the past two decades, Wallace P. Carson, now chief justice of the Oregon Supreme Court, took pride in helping to build a high-quality, if lean, state court system. On Monday, he took some of the first

public steps to begin dismantling it. He knows it's a shame. Oregonians should know it, too.

Petitioners are aware that this Court can, and has, exercised its Article III powers as in the case of *ERIE R. CO. v. TOMPKINS*, 304 U.S. 64 (1938) where the Court held "because the question was one not of local, but general, law, and that 'upon questions of general law the federal courts are free , in absence of a local statute, to exercise their independent judgment as to what the law is." Here in Oregon the petitioners have a similar problem like that presented in *Erie R. Co.* supra, in that the State of Oregon does have a local/state statute/law but they don't have a court in which to apply the law.

**E. United States Constitution, Article IV, Section 4**

Petitioners pledge their allegiance to the flag of the United States of America and to the Republic for which it stands. The United States is mandated to guarantee to every State in this Union a Republican Form of Government, and mandated to protect each of them against Invasion. Our institutions and their perpetuity, as well as our rights, liberty and property, depend upon the integrity of the courts. The Executive and Legislative Branches can fail in their respective duties, but if the people lose their courts the whole structure topples.

In November of 1910, the Judicial Branch of the State of Oregon was invaded from within and overthrown, and the courts of Oregon are now usurped and held by persons who are not under the Judicial Oath of Office.

The counsel for the defendant, State of Oregon, a.k.a. STATE OF OREGON, is pleading the Eleventh Amendment Immunity to protect the status quo of the invasion and usurpation of the original Judicial Branch of the State of Oregon. The decision of the United States District Court for the District of Oregon to adopt this Eleventh Amendment defense, and for the United States Court of Appeals for the Ninth Circuit affirming the lower courts decision circumvents the mandates set forth in Article IV, Section 4 of the United States Constitution.

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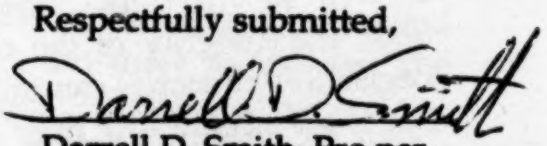
## CONCLUSION

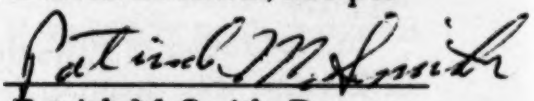
For any one or all of the reasons stated above, Petitioners Darrell D. Smith, Patrick M. Smith and John McBride respectfully prays that a writ of certiorari issue to review and remand the unpublished 13 June 2002 Order of the United States Court of Appeals for the Ninth Circuit.

Dated this 29, day November 2002.

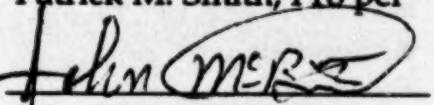
Respectfully submitted,



Darrell D. Smith, Pro per



Patrick M. Smith, Pro per



John McBride, Pro per

**APPENDIX A**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**DARRELL D. SMITH; et al.,**
**Plaintiffs-Appellants,**

**v.**

**STATE OF OREGON,**
**Defendant-Appellee.**
**No. 01-35512**

Appeal from the United States District Court
For the District of Oregon
Robert E. Jones, District Judge, Presiding

Submitted March 11, 2002
Decided March 21, 2002

Before: CANBY, BEEZER AND PAEZ, Circuit Judges.

Darrell D. Smith and two other Oregon residents appeal pro se the district court's order dismissing their 42 U.S.C. Sec. 1983 action on Eleventh Amendment immunity grounds. We review de novo a dismissal under the Eleventh Amendment, *Price v. Akka*, 928 F.2d 824,827 (9th Cir. 1990). We have jurisdiction pursuant to 28 U.S.C. Sec. 1291, and we affirm.

Appellants contend that the State of Oregon did not adopt ballot measure 362-363, approved by the voters on November 8, 1910, and therefore the measure is not properly part of the Oregon Constitution. The district court properly dismissed this action under the Eleventh Amendment, because the State of Oregon has not consented to suit. *See Quillin v. Oregon*, 127 F.3d 1136, 1138 (9th Cir. 1997) (per curiam); *Oregon Short Line R.R. Co. v. Dep't of Revenue Oregon*, 139 F.3d 1259, 1263 (9th Cir. 1998) (holding Eleventh Amendment bars suits against state by its own citizens).

**AFFIRMED.**

# APPENDIX B

## UNITED STATES COURT OF APPEALS
## FOR THE NINTH CIRCUIT

**DARRELL D. SMITH, et al.,**
**Plaintiff-appellant**
**v.**
**STATE OF OREGON,**
**Defendant-Appellee.**
**No. 01-35512**

Decided June 13, 2002

Before: CANBY, BEEZER and PAEZ, Circuit Judges

The panel has voted to deny appellant's petition for rehearing. Judge Paez has voted to deny petition for rehearing en banc, and Judges Canby and Beezer so recommend.

The full court has been advised of the ppetition for rehearing in banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings shall be accepted in this closed appeal.

## APPENDIX C

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF OREGON**

| | | |
|---|---|---|
| DARRELL D. SMITH, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | Civil No. 00-1687-ST |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| STATE OF OREGON, | ) | |
| | ) | |
| Defendant. | ) | |

JONES, Judge:

Magistrate Judge Janice M. Stewart filed Findings and Recommendations (#13) on December 18, 2000, in the above entitled case. The matter is now before me pursuant to28 U.S.C. Sec. 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of a magistrates judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the magistrate's report. See 28 U.S.C. 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), cert. Denied, 455 U.S. 920 (1982).

Plaintiffs have timely filed objections. I have, therefore, given de novo review of Magistrate Judge Stewart's rulings.

I find no error. Accordingly, IADOPT Magistrate Judge Stewart's Findings and Recommendation (#13)

dated December 15, 2002, in its entirety. The "Joinder in the Action (#7) filed by Clifford Scott Barker and Sarah-Jane Price is construed as a motion for joinder and is granted. Defendant's Motion to Dismiss (#3) for lack of subject matter jurisdiction (part of #3) is granted. All other pending motions are denied and this case is dismissed with prejudice.

IT IS SO ORDERED.

DATED this 4th day of April, 2001.

/s/ Robert E. Jones
ROBERT E. JONES
United States District Judge

**IN THE UNITED STATE DISTRICT COURT**
**FOR THE DISTRICT OF OREGON**

| | | |
|---|---|---|
| DARRELL D. SMITH, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | Civil No. 00-1687-ST |
| | ) | |
| v. | ) | JUDGMENT |
| | ) | |
| STATE OF OREGON, | ) | |
| | ) | |
| Defendant. | ) | |

Based upon the record,
IT IS ORDERED AND ADJUDGED this case is dismissed with prejudice.
DATED this 4th day of April, 2001.

/s/ Robert E. Jones
ROBERT E. JONES
United States District Judge

No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

Darrell D. Smith, Patrick M. Smith,
John McBride, John and Jane Doe - PETITIONERS
vs.
STATE OF OREGON - RESPONDENT

**PROOF OF SERVICE**

I, Darrell D. Smith, Patrick M. Smith and John McBride, do declare that on this date, November 29, 2002, as required by the Supreme Court Rule 29 we have served the enclosed PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. The names and addresses of those served are as follows:

Hardy Myers
Attorney General for Oregon
400 Justice Building
Salem, Oregon 97310

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 29, 2002.

Darrell D. Smith
Patrick M. Smith
John McBride

Supreme Court, U.S.
FILED
SEP 11 2002
OFFICE OF THE CLERK

No. 02-986

In The

# Supreme Court of the United States

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Darrell D. Smith, Patrick M. Smith
John McBride, and John and Jane Doe,
PETITIONERS,

vs.

STATE OF OREGON,
RESPONDENT.

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**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## SUPPLEMENTAL APPENDIX

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Darrell D. Smith
3721 Westgate
Pendleton, OR
97801
541 276 8263

Patrick M. Smith
413 Harrison St.
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97835

John McBride
2485 15th St.
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97814

Petitioners Pro-Per

December 18, 2002

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10 pp

**APPENDIX D**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF OREGON**

| | | |
|---|---|---|
| DARRELL D. SMITH; PATRICK M. SMITH; JOHN McBRIDE; and JOHN and JANE DOE, | ) | CV-00-1687-ST |
| Plaintiffs, | ) | ORDER |
| v. | ) | |
| STATE OF OREGON, | ) | |
| Defendant. | ) | |

STEWART, Magistrate Judge:

On june 8, 1999, plaintiffs Darrell D. Smith, Patrick M. Smith, John McBride, and John and Jane Doe, filed this action in the United States District Court for the District of Columbia, *Smith, et al. v. State of Oregon*, Civil No. 99-1490-LFO. In this case, plaintiffs seek declaratory relief that Measure 362-363, approved by the voters of the State of Oregon on November 8, 1999, was not validly adopted and may not properly be made part of the Oregon Constitution. The sole named defendant is the State of Oregon.

On December 12, 2000, after defendant filed a motion to dismiss, plaintiffs filed an Amended Complaint (docket #11). Although plaintiffs filed a Motion for Leave to Amend and perfect the Complaint on September 7, 1999 (docket #5), that motion was

never ruled on. Because the Amended Complaint does not appear to differ substantively from the original Complaint, the Motion for Leave to Amend (docket #5) is granted.

DATED this 15th day of December 2000.

/s/ Janice M. Stewart
Janice M. Stewart
United States Magistrate Judge

**APENDIX E**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF OREGON**

| | | |
|---|---|---|
| DARRELL D. SMITH; PATRICK M. SMITH; JOHN McBRIDE; and JOHN and JANE DOE, | ) | CV-00-1687-ST |
| Plaintiffs, | ) | FINDINGS AND RECOMMEND- |
| v. | ) | ATIONS |
| STATE OF OREGON, | ) | |
| Defendant. | ) | |

STEWART, Magistrate Judge:

## INTRODUCTION

On June 8, 1999, plaintiffs Darrell D. Smith, Patrick M. Smith, John McBride, and John and Jane Doe, filed this action in the United States District Court for the District of Columbia, *Smith, et al. v. State of Oregon*, Civil No. 99-1490-LFO. In this case, plaintiffs seek declaratory relief that Measure 362-363, approved by the voters of the State of Oregon on November 8, 1999, was not validly adopted and may not properly be made part of the Oregon Constitution. Specifically, plaintiffs seek declarations that Measure 362-363 violates Article IV, VII, XVII of the Oregon Constitution. The sole named defendant is the State of Oregon.

On August 24, 1999, defendant filed a motion to dismiss this case for insufficient service under FRCP 12(b)(5), to transfer the action to the United States District Court for the District of Oregon for improper venue under FRCP 12(b)(3), to dismiss the case for lack of subject matter jurisdiction under FRCP 12(b)(1), and to dismiss the case for failure to state a claim under FRCP 12(b)(6). On August 31, 1999, Clifford Scott Barker and Sarah Jane Price filed a "Joinder in the Action" apparently seeking to join this action as plaintiffs and seeking damages for the costs incurred in defending cases in the Union County Circuit Court for the State of Oregon and in the United State District Court for the District of Oregon.

On December 14, 1999, United States District Judge Louis F. Oberdorfer granted defendant's motion to dismiss in part and ordered the action transferred to this court. Judge Oberdorfer did not rule on the remaining issues in defendant's motion to dismiss and did not rule on the pending request for joinder.

On December 12, 2000, plaintiffs filed an Amended Complaint (docket #11), which this court has granted in the accompanying Order. For the reasons that follow, both the request for joinder and the motion to dismiss for lack of subject matter jurisdiction should be deemed as filed against the Amended Complaint, should be granted, and this action should be dismissed with prejudice.

## MOTION TO JOIN

Under FRCP 20, "[a]ll persons may join in one action as plaintiffs if they assert any right to relief jointly, or in

the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." Although their "Joinder to the Action" is somewhat vague, Clifford Scott Barker and Sarah Jane Price appear to seek joinder to collect damages for costs incurred defending actions against them which resulted from application of Measure 362-363. Their "Joinder to the Action" (docket #7) should be construed as a motion for joinder and be granted.

## MOTION TO DISMISS

### I. Legal Standard

A motion to dismiss under FRCP 12(b)(1) confronts the courts subject matter jurisdiction. Federal courts are courts of limited jurisdiction and a case is presumed to fall outside a federal courts jurisdiction unless proven otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 US 375, 377 (1994). Plaintiff bears the burden of proof that jurisdiction exists. *Thornhill Pub. Co. Inc. v. General Tel. & Electronics Corp.*, 594 F2d 730, 733 ((th Cir 1979) (citation omitted)

> [W]here a jurisdictional issue is separable from the merits of a case, the court may determine jurisdiction by the standards of Rule 12(b)(1) motion to dismiss for lack of jurisdiction. In such a situation, the district court is "free to hear evidence regarding jurisdiction and to rule on the issue prior to trial, resolving factual disputes where necessary."

*Roberts v. Corrothers*, 812 F2d 1173, 1177 (9th Cir 1987), quoting *Augustine v. United States*, 704 F2d 1074, 1o77 (9th Cir 1983) (internal quotation omitted). However, the question of jurisdiction is dependant on the resolution of factual issues going to the merits, a court may not resolve genuinely disputed facts. *Augustine*, 704 F2d at 1077.

**II. Eleventh Amendment**

The Eleventh Amendment to the United States Constitution prohibits suits in federal courts against a state, regardless of the nature of the relief sought, unless the stat unequivocally consents. *Pennhurst State Sch. & Hosp. V. Halderman*, 465 US 89, 100 (1984). This bars suits against states in federal courts not only by actions brought by citizens of another state, but also to those brought by citizens of the state involved. *See Dellmuth v. Muth*, 491 US 223, 229, n2 (1989), citing *Hans v. Louisiana*, 134 US 1 (1890) ("[A]n unconsenting State is immune from liability for damages in a suit brought in federal court by one of its own citizens.").

The Eleventh Amendment confirms that each state is a sovereign entity and that "'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" *Seminole Tribe of Florida v. Florida*, 517 US 44, 54 (1996), *quoting Hans*, 134 US at 13. Accordingly, the Supreme Court has long held that "[t]his express constitutional limitation denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent." *Ford Motor Co. v. Dept. of Treasury of Ind.*, 323 US 459, 464 (1945) (citations omitted). The Eleventh Amendment bars suits for damages in federal court

against a state or its agencies or its officials. *Pennhurst*, 456 US at 100 (citations omitted) It precludes suits in law and equity. *Patsy v. Board of regents of Fla.*, 457 US 496, 530 (1982) (citations omitted). Recent decisions by the Supreme Court have demonstrated the continuing vitality of the Eleventh Amendment bar. *See Kimel v. Florida Bd. Of Regents*, 528 US 62 (2000) (Age Discrimination in Employment Act does not validly aborgate a State's sovereign immunity); *Alden v, Maine*, 527 US 706, (1999) (barring individual suit against a State to enforce rights under the Fair Labor Standards Act).

Oregon has not consented to suit by explicitly waving its Eleventh Amendment immunity. *See Rounds v Oregon State Bd. of Higher Ed.*, 166 F3d 1032 (9th Cir 1999); *Quillin v. Oregon*, 127 F3d 1136 (9th Cir 1997). In their Complaint, plaintiffs name the State of Oregon as the only defendant. Although plaintiffs seek declaratory relief, the Eleventh Amendment clearly bars all claims against a State unless the State unequivocally consents. Plaintiffs have provided this court with no citation to any authority indicating that the State of Oregon has consented to suits of this nature. Therefore, the Eleventh Amendment bars plaintiffs' claims. For this reason, defendant's motion to dismiss for lack of subject matter jurisdiction should be granted, and this action dismissed with prejudice.

## RECOMMENDATIONS

For the reasons set forth above, the "Joinder in Action" (docket #7) filed by Clifford Scott Barker and

Sarar-Jane Price should be construed as a motion for joinder and be granted. Defendant's Motion to Dismiss (docket#3) for lack of subject matter jurisdiction (part of docket #3) should be GRANTED. All other motions should be DENIED, and this case should be DISMISSED WITH PREJUDICE.

**SCHEDULING ORDER**

Objections to these Findings and Recommendations, if any, are due January 5, 2001. If no objections are filed, then the Findings and Recommendations will be referred to a district court judge and go under advisement on that date.

If objections are filed, t5he response is due no later than January 25, 2001. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will be referred to a district court judge and go under advisement.

DATED this 15th day of December 2000.

/s/ Janice M. Stewart
Janice M. Stewart
United States Magistrate Judge

No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

Darrell D. Smith, Patrick M. Smith,
John McBride, John and Jane Doe – PETITIONERS

vs.

STATE OF OREGON – RESPONDENT

**PROOF OF SERVICE**

I, Darrell D. Smith, Patrick M. Smith and John McBride, do declare that on this date, December 18, 2002, as required by the Supreme Court Rule 29 we have served the enclosed **SUPPLEMENTAL APPENDIX** on each party to the above proceeding or party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. The names and addresses of those served are as follows:

Hardy Myers
Attorney General for Oregon
400 Justice Building
Salem, Oregon 97310

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 18, 2002.

Darrell D. Smith
Patrick M. Smith
John McBride